

1997

# Marriage Today: Legal Consequences for Same Sex and Opposite Sex Couples

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## Recommended Citation

Chambers, David L. "Marriage Today: Legal Consequences for Same Sex and Opposite Sex Couples." *Law Quad. Notes* 40, no. 2 (1997): 60-70. (Adapted from an essay originally published as "What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples." *Mich. L. Rev.* 95, no. 2 (1996): 447-91)

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# MARRIAGE



## Legal Consequences for Same Sex and Opposite Sex Couples

*This essay is adapted from "What if? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples," which appeared in 95 Michigan Law Review 447-491 (1996) and is printed with permission from the journal and the author. For a fully cited version of this essay, contact the author.*

Laws that treat married persons in a different manner than they treat single persons permeate nearly every field of social regulation in this country — taxation, torts, evidence, social welfare, inheritance, adoption, and on and on.

In this article I inquire into the patterns these laws form and the central benefits and obligations that marriage entails, a task few scholars have undertaken in recent years. I have done so because same-sex couples, a large group not previously eligible to marry under the laws of any American jurisdiction, may be on the brink of securing the opportunity to do so in Hawaii. I wanted to know the benefits and burdens that legal marriage might extend to this group and ask whether the consequences would be sensible and appropriate for same-sex couples. How, in other words, would this institution, molded over time for persons of different sexes, apply to those with different differences?

My findings form the core of this article: that the laws assigning consequences to marriage today have much more coherence than has been commonly recognized, largely falling within three sorts of regulation; that each of these three sorts of regulation would, as a whole, fit the needs of long-term gay male and lesbian couples; that while the law has changed in recent years to recognize nonmarital relationships in a variety of contexts, the number of significant distinctions resting on marital status remains large and durable; that in some significant respects the remaining distinctive laws of marriage are better suited to the life situations of same-sex couples than they are to those of opposite-sex couples for whom they were devised; and, most broadly, that the package of rules relating to marriage, while problematic in some details and unduly exclusive in some regards, are a just response by the state to the circumstances of persons who live together in enduring, emotionally based attachments.





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as married, even though they know that the ceremonies are not legally recognized by the laws of any state. If states extend the legal right to marry, it is highly probable that large numbers of gay and lesbian couples would choose to participate. In a recent survey of nearly 2600 lesbians, for example, seventy percent said they would marry another woman if same-sex marriage were legally recognized.

Exactly what lesbians and gay men hope to obtain from legal marriage is uncertain. Since public ceremonies of commitment are already so common, one might expect that when debating state-sanctioned marriage, they would focus on what law itself can accord that other institutions cannot: a range of legally protected benefits and legally imposed obligations. In fact, they do not. In the vigorous public discussion, few advocates address at any length the legal consequences of marriage. William Eskridge, for example, devotes only six of the 261 pages in his fine new book, *The Case for Same-Sex Marriage*, to the legal consequences, and his, with one exception, is the longest discussion I can find. Whatever the context of the debate, most speakers are transfixed by the symbolism of legal recognition. It is as if the social significance of the marriage ceremonies gay people already conduct today count for nothing — as if, without the sanction of the state, those who marry have merely been playing dress-up.

Just at the point that I finished this article, Congress acted to limit the effects that legal marriage would have, if Hawaii or any other state moved to permit same-sex couples to marry. The new “Defense of Marriage Act” declares that all federal statutes and regulations that refer to married persons or to spouses shall be read as applying to opposite-sex couples only. This article persists in reviewing both federal and state laws that bear on married persons, for the purpose of my exercise of imagination — the “what if? — is to ask how opposite-sex married persons are treated under the law today and hold these laws up to the situations of lesbian and gay male couples.

### I. Postures toward marriage

A large proportion of American adults who identify themselves as lesbian or gay live with another person of the same sex and regard that person as their life partner. Exactly how many gay or lesbian adults there are in the United States and what proportion live with another in a long-term relationship are not possible to calculate on the basis of existing information. Still, every survey of adult Americans willing to identify themselves as lesbian or gay finds that a majority or a near majority are living currently with a partner. Increasing numbers of these couples are celebrating their relationships in ceremonies of commitment. Those who participate commonly refer to the ceremonies as weddings and to themselves



That the social meanings of state recognition draw so much attention is nonetheless understandable. In our country, as in most societies throughout the world, marriage is the single most significant communal ceremony of belonging. In a law-drenched country such as ours, permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted.

Skeptics about marriage within the lesbian and gay communities also largely ignore the legal consequences of marriage. They focus instead on the negative meanings they attach to the institution itself. To many, marriage signifies hierarchy and dominance, subjugation and the graves of countless generations of married couples; one stone reads "Herbert Smith," the other simply reads "Wife." And even if the legal institution of marriage has changed in the recent past, they resist the assimilation of queer couples into an oppressive heterosexual orthodoxy of ascribed roles and domesticity.

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## II. The legal consequences of marriage

Each of the fifty states defines the incidents of marriage for its residents. Federal laws add hundreds of other legal consequences. Some scholars have characterized the multitude of legal attributes of marriage today as largely incoherent, and in their details they surely are. Yet it is possible to identify three central categories of regulation, within each of which a certain coherence obtains: some laws recognize affective or emotional bonds that most people entering marriage express for each other; some build upon assumptions about marriage as creating an environment that is especially promising or appropriate for the raising of children; and some build on assumptions (or prescriptive views) about the economic arrangements that are likely to exist (or that ought to exist) between partners.

As you read, you will encounter occasional ghosts from an authoritarian and formally gendered past. The laws dealing with married persons have undergone a massive transformation during the last century. Well into the nineteenth century, all assets of a married couple, including those that the wife brought into a marriage, were controlled by the husband. In fact, her personal property became his property. The husband also, as a matter of law, controlled all decisions that related to a married couple's children. This male-controlled relationship was also difficult or impossible

to leave. At the beginning of the nineteenth century, marriage was indissoluble under the laws of nearly all states. Later in the century, it was dissoluble, but only on proof by one sinless spouse of a serious marital sin committed by the other.

Today, legislatures or judicial decisions have removed virtually all rules that explicitly provide different status or authority for husbands. They also permit marriage to end without proof of marital fault. The compulsory and sex-linked aspects of the law of marriage have, during the latter half of this century, been withering away, sometimes at the price of providing insufficient protection to women economically ill-positioned to protect themselves. As we will see, for example, the rules of divorce commonly treat marriage as a partnership with an equal division of property, but, because of their lower earnings, women are generally left significantly worse off financially than men are. Most gay and lesbian couples can, however, appropriately regard the legal aspects of marriage today as serving primarily, though not entirely, a facilitating function — offering couples opportunities to shape satisfying lives as formal equals and as they, rather than the state, see fit.

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### A. Regulations that recognize emotional attachments

Some laws and regulations dealing expressly with married persons can best be viewed today as promoting the emotional attachments that most spouses feel toward each other. Here are a few examples. Statutes or common law doctrine in all states grant decisionmaking powers to relatives when a person becomes incompetent to make decisions for herself. Two broadly different sorts of laws exist. The more narrow sort authorizes a family member to make an emergency medical decision when a person has become incompetent and has failed to execute a formal document authorizing some other person to make decisions on her behalf. When such incapacity arises for an unmarried person, state laws designate a parent or an offspring or some other blood relation as decisionmaker, but, for persons who are married, they typically turn first to the person's spouse. The second sort of law, broader in scope, provides for the formal appointment of a "guardian" or "conservator," who typically makes not only medical decisions but other decisions about

residence, care, and financial matters. These statutes also differ widely, but commonly provide first for the appointment of a blood relative for a single person and a spouse for a married person. The Uniform Probate Code, for example, has been adopted in fourteen states, and establishes an order or preference for the appointment of relatives as the guardian for an incapacitated person, with the spouse first in line, followed by an adult child or a parent. Upon death, other laws or court decisions provide that the spouse has first right as "next of kin" to claim a person's remains and to make anatomical gifts of parts of the deceased person's body when the deceased person has made no directive of her own.

In a similar manner, state laws designate the spouse as the person to receive part or all of a married person's assets when he or she dies without a will. These "intestacy" laws vary widely among the states. In some states, if there are surviving children, a spouse receives as little as a third; in many others, a fixed dollar amount and a share of the remainder; in still others, the entire estate. In most states, if there are no surviving children and no surviving parents, the spouse receives everything.

The laws relating to incompetency and death serve fairly obvious functions but ones worth explicit recognition. Some relate to the control of property, a subject taken up later. But most fundamentally, for couples who see themselves in an enduring relationship, the spouse is the appropriate person for the state to designate as decisionmaker during a period of incompetency and as primary beneficiary after death on the basis of a reasonable guess that that is the person whom the now-incompetent or deceased person would have chosen if she had addressed the question in advance. That is, the rule fulfills her probable wishes.

Do gay men and lesbians with partners need the protection of such laws to ensure that their partners make decisions for them or inherit their estates? A very few states designate a long-term unmarried partner as the preferred decisionmaker for the incompetent person, but most states ignore the unmarried partner altogether. Similarly, only a very few states provide that an unmarried partner shall receive any portion of the estate of a person who dies without a will and, to date, no state provides anything for a same-sex partner. Despite this, one could argue that gay couples do not need such protections because they can protect themselves fully by simply executing a will or a medical power of attorney. But gay men and lesbians who are in relationships need these protections for the same reason that

heterosexual persons need them. Like most heterosexuals, most gay men and lesbians are reluctant to think about their mortality and procrastinate about remote contingencies. They fail to execute wills and powers of attorney, even though they are often aware of the unfortunate consequences of failing to act.

Even if all persons with a same-sex partner remembered to execute the proper documents and had access to the needed legal services, other forms of government regulation that recognize special emotional and spiritual ties could not be similarly handled by a scheme of private designations. Consider four examples. Federal law places severe restrictions on the opportunities for foreign-born nationals to immigrate legally to the United States. One significant exception to this rule of exclusion is that a foreign-born national who enters into a nonfraudulent marriage with an American citizen has a presumptive right to enter the United States immediately as a long-term resident. No such special provisions are made for a friend or lover. Even brothers or parents of a U.S. citizen are not automatically entitled to preferential treatment, but typically face long waiting periods before entry.

Another federal law, the Family and Medical leave Act of 1993, requires all employers with fifty or more employees to extend unpaid leave of up to twelve work weeks during each year to an eligible employee to care for a spouse with a "serious health condition." The statute also provides for leaves to care for children and for parents, but makes no provision of any kind for friends, lovers, or unmarried partners.

The federal government and many states also extend an advantage to married people when called to testify in a criminal proceeding that bars the state from forcing a married person to testify against his or her spouse. Nearly all states offer a related protection, typically in both civil and criminal proceedings, for confidential communications made between spouses during the marriage.

Finally, under the law of many states, if a third person injures a married person negligently and by so doing deprives the spouse of care and companionship, the spouse can typically sue the injuring party for what is called loss of "consortium," compensation not for financial loss but for the loss of companionship.

The immigration preference for spouses, the family leave provisions, the evidentiary rules, and the consortium rules have a common current justification: that it is fitting for the state to recognize the significance in people's lives of one especially important

person to whom they are not biologically related. Lesbians and gay men in long-term relationships attribute a similar level of importance to their partners (even if they have other gay and lesbian friends they also consider significant). They need these rules as much as heterosexual people do.

Gay men and women would experience as a burden, not as a benefit, a few regulations that attach to marriage and that also build, in substantial part, on assumptions about the emotional salience of the marital relationship. Public and private employers, for example, adopt antinepotism regulations that prohibit employees from participating in decisions to hire, promote, or discharge their spouse or from supervising their spouse in the workplace. Resting on views about both emotional and economic ties, these regulations are as justifiably imposed on lesbians and gay men in enduring relationships as they are on heterosexuals: no one can be expected to be sufficiently objective when decisions about one's own long-term partner must be made.

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## B. Regulations dealing with parenting

Gay male and lesbian couples raise children in this country in three common contexts. In the first, numerically the most common, one of the partners has already become the biological parent of a child (usually in the course of a prior relationship with a person of the opposite sex) and then has later formed a relationship with a same-sex partner. This new partner is functionally in the position of a "stepparent." In the second context, a same-sex couple, *after* beginning a relationship, agree to raise a child together. They plan that one of them will be the biological parent and that, after birth, they will serve as co-parents. In the third context, a same-sex couple seeks to adopt or to become the foster parents of a child who is biologically related to neither of them.

Opposite-sex couples also raise children in each of these sorts of contexts and, in each, laws and practices in all states treat such couples, when married, in specially favored ways. By contrast, in each of the three situations, a gay or lesbian partner who is not the biological parent of the child typically faces formidable, often insuperable, difficulties in becoming recognized as a legal parent at all. The laws that advantage married couples are needed by *some* heterosexual married couples who wish to raise children, but these same laws would be helpful to almost *all* lesbian and gay male couples who wish to raise a child as legal equals because, for them, it is always the

case that neither partner or only one is the biological parent of the child.

In each context, most of the rules would be defended today as intending to serve the best interests of children. I will focus on the value of these rules both for children and for lesbian and gay male adults who wish to raise children. As to the interests of children, a great deal has been written on the adequacy of gay men and lesbians as parents in the past two decades. I do not intend to review this literature. It is well reported elsewhere. In overwhelming measure, it concludes that a person's sexual orientation has no significant bearing on her or his parenting capacities or skills and that children raised by lesbian and gay male parents fare as well day by day and over time as children raised by other parents.

As we will see, some of the difficulties currently experienced by gay men and lesbians who wish to raise children are not formally imposed by law. Some arise under rules that courts and agencies already have the discretion to extend to gay people or to same-sex couples, but rarely do. Thus, in some contexts, the benefits of legal marriage for same-sex couples may lie less in the rules that would become applicable to them than in a changed attitude toward homosexual persons that a change in marriage laws might help bring about on the part of legal actors exercising authorities that already exist. Here the symbolic and the legal intertwine.

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### 1. The stepparent relationship

When a lesbian or gay male parent with custody of a child begins to live with another person of the same sex, the new person assumes a parenting role functionally comparable to a stepparent. The state of the law about such parenting relationships outside of marriage is clear: no matter how long the gay "stepparent" lives with the child, no matter how deeply she becomes involved in the care of the child, she and the child will rarely be recognized as having a legally significant relationship with one another. The state of the law is essentially the same for stepparent figures in opposite-sex unmarried couples. They are just the "boyfriend" or "girlfriend" or "live in" of the custodial parent and have no legal significance.

Perhaps surprisingly, until the recent past, the legal position of the opposite-sex partner who marries a custodial parent has been little different. In all but a few states, the stepparent married to a biological parent has not been legally obliged to contribute to the support of the child during the marriage. In no state has the stepparent been required to

contribute to the child's support upon divorce, no matter how long he lived with the child or the extent of his voluntary contributions. The stepparent has also had no legal entitlement upon divorce to be considered for court-ordered visitation or for sole or joint custody of the child. It has been the absent biological parent who remained financially liable for support, who remained the one parent eligible for visitation (even if he never lived with the child), and who remained second in line for custody.

Recently, however, stepparents married to a custodial parent are coming to be recognized as parent figures for at least some purposes, and it is to the benefits of these laws and court decisions that gay and lesbian "stepparents" need access. A few states have begun, for example, to protect the relationship between a child and a stepparent whose marriage to the biological parent comes to an end. No state has imposed on the stepparent a general obligation of support upon divorce, but some courts and a few legislatures have given courts the authority to grant visitation and, in unusual circumstances, custody, even over the objection of the biological parent.

States have also expanded the opportunities for stepparents during their marriage to a biological parent to become the full legal parent of a stepchild through adoption. If the absent biological parent consents, most states permit the married stepparent to adopt without any of the home visits and family studies usually required as a part of the adoption process. Consensual stepparent adoptions now account for over half of all adoptions that occur in the United States. Within the last few decades, most states have recognized certain circumstances in which stepparents living with and married to a biological parent are permitted to adopt even over the objection of the absent biological parent.

A further change regarding stepparents is found in laws relating to employment in the labor force. State worker's compensation programs and the federal Social Security survivor benefit program permit a minor stepchild living with and dependent upon a stepparent to receive benefits after the stepparent's death. These programs replace much of the income lost to a child upon the death of the supporting stepparent. Similarly, the Federal Family and Medical Leave Act of 1993 requires employers to permit a worker to take up to twelve weeks of unpaid leave to care for their seriously ill child, including a stepchild.

Despite these reforms that apply to stepparents married to a biological parent, unmarried stepparent figures, of the same or

opposite sex as the custodial parent, remain almost totally ignored by the law, wholly ineligible, for example, for the special treatment for stepparent adoption, wholly unable to secure for a child the benefits of workers' compensation or Social Security survivor benefits, and ineligible for the protections of the Federal Family and Medical Leave Act. They also remain free of the legal obligations that would come with adoption — most notably the obligation to provide financial support for the child they adopt. Extending these benefits and obligations to lesbians and gay men by permitting them to marry would serve well their needs and the needs of their children for the same reasons that they serve the needs of married opposite-sex couples and their children: children who live with a stepparent figure who is in a committed relationship with their biological parent often become attached to and financially dependent upon the stepparent and these attachments warrant recognition.

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## 2. Artificial insemination, sperm donors and surrogacy

The second parenting context for gay men and lesbians includes the same-sex couples, already formed, who agree that one of them will become the biological parent of a child whom they will raise together. Here the issues are rather different for women than for men.

When a lesbian couple plan that one of them will become pregnant — and large numbers of lesbian couples seek to have babies today in this manner — they first must find a source of sperm. Some face problems that are not formal barriers of law but that are probably aggravated by the outlaw status of their relationship. Sperm banks in all states provide insemination services to women, most commonly in circumstances in which the woman is married and her husband is sterile. While no state expressly prohibits sperm banks from providing services to unmarried women or to lesbians, some doctors and sperm banks apparently decline to do so.

Clearly legal problems arise after birth, at the point that the lesbian partner seeks to become recognized as a legal parent. She will be able to achieve such recognition only if she successfully completes a formal process of adoption. In most states, her petition to adopt will be rejected, either because her partner and she are of the same sex, or because they are not married to one another, or both. In a growing number of states, the lesbian partner can be considered for adoption, but even in these states, the best

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the couple can hope for is that, after completing elaborate forms and enduring an intrusive home study and an individualized inquiry into the child's "best interests," a court eventually, many months after the child's birth, will approve the application of the nonbiological parent to adopt. The whole process is likely to cost thousands of dollars.

Lesbian couples need a simpler and more welcoming process. They need, at a minimum, the procedures available in most states to legally married couples in comparable circumstances. For such couples, most states' laws provide a straightforward procedure governing artificial insemination through clinics or sperm banks. The sterile husband simply acknowledges in writing his concurrence in his wife's insemination and his acceptance of the child as his own. He is then treated for purposes of the law in exactly the manner that he would be if he had been the biological father. No home study is required. No court hearing is held. The child's birth certificate simply records him as the father of the child. Lesbian couples need access to the same automatic registering of parenthood for the nonbiological female partner.

Similarly problematic are the situations for gay male partners when they wish one of them to serve as the biological father for a child they plan to raise together. This situation is troublesome for it necessarily involves a much more substantial involvement by the other biological parent — the surrogate mother — than in the case of artificial insemination through a surrogate father, involvement under circumstances in which there are well-founded concerns for the interests of the mother and of women in general.

Reflecting differing resolutions of these concerns, state laws vary widely today regarding the legality and enforceability of surrogacy arrangements. Some prohibit surrogacy agreements altogether; some refuse to enforce them but do not prohibit the arrangements if voluntarily carried out; and some permit enforcement if the parties comply with various state-imposed requirements and if the mother does not change her mind within a statutorily prescribed period. Among the requirements in many states is that only married couples may enter into surrogacy arrangements with a donor mother. Thus, under these varying schemes, few gay men could legally enter into an enforceable surrogacy agreement, and when they are able to do so, they would still have to overcome the adoption problems that lesbian couples face when both partners seek to be recognized as the legal parents of the child born to one of them.

The issues surrounding surrogacy are complex, but, whatever their resolution, gay male couples need access to whatever scheme is made available to opposite-sex married couples.

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### **3. When neither partner is the biological parent: adoption and foster care**

Today, a few states prohibit lesbian and gay men from adopting under any circumstances and a few others prohibit them from serving as foster parents. Most other states make adoption or foster care very difficult in practice for persons who are openly gay or lesbian. Single heterosexual individuals are also disfavored in practice almost everywhere. When single persons, gay or heterosexual, are permitted to adopt, they are often offered only the most hard-to-place children, children who are older and have had multiple foster placements, or children with multiple handicaps.

By contrast, while procedures for adoption and foster care vary widely across the country, it is the case everywhere that, whatever the procedure, the married heterosexual couple stands highest in the hierarchy of preferred units for placement of a child. The status that is accorded to married opposite-sex couples today would provide fully adequate legal protection for the interests of gay male and lesbian couples and for the children they would raise.

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### **C. Laws regulating the economic relationship of couples or between the couple and the state**

A considerable majority of the laws that provide for differing treatment for married persons deal with the married couple as an economic unit. They build on beliefs or guesses about the economic relationships that married persons actually have and on prescriptive views about what those relationships ought to be. They assume that married persons differ from most single persons, including most single persons who share a residence with another person, in one or more of the following ways: the married partners will live more cheaply together than they would if they lived apart (that is, that there are routine economies of scale); the two will pool most or all of their current financial resources; the two will make decisions about the expenditure of these resources in a manner not solely

determined by which party's labors produced the resource; the two will often engage in divisions of labor for their mutual benefit; and one partner, typically the woman, will often become economically dependent on the other.

To the extent that these laws have an empirical foundation, it is unclear whether the images of opposite-sex relationships that lie behind them will fit the circumstances of the sorts of gay male and lesbian couples who would marry under a change in the law. What evidence there is suggests that most lesbian and gay couples in long-term relationships believe in pooling resources and practice it today, and that pooling is particularly common among those who engage in ceremonies of commitment.

The review that follows divides the many financial regulations that treat married persons differently than single persons into two rough sorts — those that fix the relationship between married persons and the state and those that fix the economic relationship between the two married persons themselves — because these sorts of regulations typically serve quite different ends.

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#### **1. The regulation of the financial relationship between married persons and the state**

Tax laws and laws pertaining to government benefits commonly treat married persons in a distinctive manner by regarding them for most purposes as a single economic unit.

Consider some examples. Federal and state income tax laws create a system of joint returns for married couples that treats the couples as a single economic entity. Under these provisions, when only one spouse earns any income, the total tax liability for the couple will be less than it would be if the income-earning spouse filed as a single person, a result that may be thought justified because two people are living on the single earner's income. On the other hand, when both spouses work and each earns even a fairly moderate income, their total tax liability will often be higher than it would have been if each had filed as a single person, a result that may again be thought justified because, by pooling incomes, they can live together more inexpensively than two single persons living separately. In many situations, these two sets of rules produce wholly justifiable outcomes, but their paradoxical impact in practice is that many working men and women maximize their incomes by living together but not marrying, each filing a separate return, even though



they might otherwise prefer to marry. The same rules also discourage some married women from seeking employment outside the home, because they conclude that the marginal tax rate on any earnings they produced would be so high as to make their economic contribution trivial.

Similar rough justifications and undesired effects characterize the rules that apply when low-income married persons who are aged, blind, or disabled apply for federal welfare benefits under the program of Supplemental Security Income (SSI). If a married couple apply together, their grant will be lower than it would be if they were treated as two individuals applying separately. Similarly, if only one member of the couple applies, the income of the applicant's spouse will be assumed to be available to the applicant and will be taken into account in determining both the applicant's eligibility for the benefit and the size of the grant. The same sorts of rules of income attribution apply when a married person seeks a government-backed educational loan. For couples who in fact pool their income and resources, these government benefit rules make sense, but they can impose hardships when the rules attribute more income as available than the spouse can comfortably contribute and can sometimes deter couples from marrying who otherwise would.

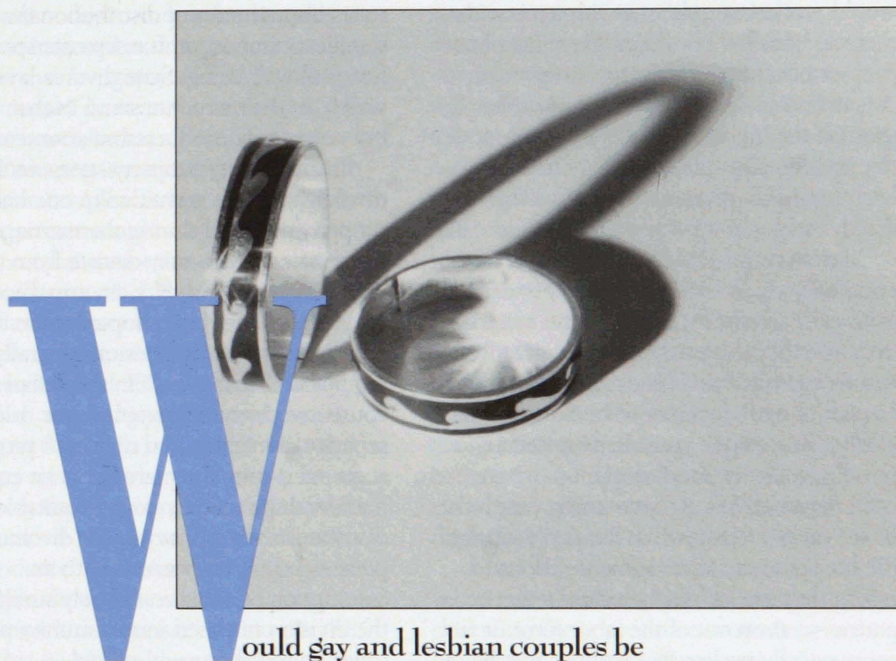
Government taxing and benefit regulations of other sorts also build on the expectation that married couples will share resources and recognize that one spouse is often economically dependent on the other. Some of these programs, fortunately, avoid the undesired behavioral incentives we have just discussed. When a long-employed worker retired with a spouse who has been a homemaker and has not worked in the labor force long enough to be entitled to full Social Security benefits in her own right, the nonworking spouse, if over sixty-two, is entitled to benefits through the worker. Similarly, when a long-employed worker dies, Social Security benefits will typically be available for a surviving spouse over sixty who is not entitled to full benefits through her own contributions as an employee.

Gift and estate taxes also reflect a view of the married couple as a single economic unit in which dependencies arise. When a well-heeled spouse transfers property to the other spouse during the marriage, the transfer is not subject to the federal gift tax that would apply to gifts to others, including the donor's children. When appreciated assets held in the name of one spouse are transferred at divorce to the other spouse, no capital gains tax or gift tax is due at the time of the transfer. And, when a spouse dies, bequests to the other spouse are not taxed under

federal estate tax laws. Public and private employers further recognize the economic interdependency of spouses by making health care benefits available to their employees' spouses, and, just as federal and state income tax laws exempt from taxation the value of a worker's own employer-provided health care benefits, so too these same laws exempt from taxation the value of the benefits for the worker's spouse.

Gay and lesbian couples are subject to none of these rules, neither the benefits nor the burdens. No joint return. No attributed income. Even when employers provide health benefits to both married employees and to employees with a same-sex domestic partner, only the married employees obtain the benefit of the tax exemption for the value of their partners' health coverage; the employee with the same-sex partner must report the value of the benefit to his partner as income and pay taxes on it.

Would gay and lesbian couples be advantaged by being treated like heterosexual married couples across this range of state and federal legal consequences? They would be subject to the same unfortunate behavioral incentives that these rules create today for opposite-sex couples. A gay man with HIV on Medicaid, for example, might choose not to marry on learning that, if he did, he would cease to be eligible for benefits even though his partner and he did not actually earn enough to pay the couple's medical bills. Indeed, it is possible that an even higher proportion of gay male and lesbian couples would be economically disadvantaged by the application of the current tax laws than are married opposite-sex couples. The only couples who consistently benefit from the current laws are those in which one partner works in the labor force, and taxes aside, both partners prefer this arrangement. Given



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enduring sex-ascribed roles, the employment of only one partner is likely to be the situation more often in opposite-sex than in same-sex couples. Moreover, the premise of the current rules is that married couples actually share in the control of resources and expenditures. When that premise fails, it is doubtful whether the burdens of the joint return should be imposed. Some observers have raised doubts about the actual degree of sharing of control in most heterosexual married couples, and it is quite possible that an even higher proportion of gay men and lesbians who would marry would be persons who in their day-to-day lives would share only some of their income.

On the other hand, remember that not all tax and welfare rules work to the harm of gay couples who would marry. In some couples, only one partner would work in the labor force, and for them the benefits of health coverage and the joint tax return might be substantial. In others, both partners would work, but only one with a job with medical benefits. For them, the value of tax-exempt benefits through the partner with coverage could be considerable. And for those at the highest end of the income scale, the benefits of the estate and gift tax exemptions might more than offset the disadvantages of a joint return.

Moreover, in actual practice, even for the couple in which both partners work and both earn significant incomes, the income tax and other rules may in actual practice less frequently cause behaviors experienced as painful by the parties. When neither partner in a couple considers himself or herself the "secondary" worker — when both partners, that is, have strong ties to the labor force — then, while the perversities of the tax laws may affect some decisions to marry, they are less likely to lead either partner to drop out of the labor force or feel economically useless in a manner that he or she resents or later comes to regret. And, viewed from another perspective, the opportunity for legal marriage, at the very least, provides a choice to opposite-sex couples whether to marry or not, a choice from which lesbian and gay couples could benefit for the same sorts of reasons.

## **2. The regulation of the financial relationship between married partners**

In the United States today, states employ either of two broad schemes of regulation to define the economic relationship between married partners. Nine states (mostly in the West and Southwest) employ "community property" regimes, under which, to oversimplify, the spouses own separately

whatever they bring into the marriage or receive by gift or bequest during the marriage and own jointly any other assets either of them acquires during the marriage, including all assets acquired from their labors. The earnings of each partner are owned jointly by the pair. In the remaining states, called "common law states," again to oversimplify, the spouses own separately whatever they acquire in their separate names and jointly whatever they buy in both names or whatever one by deliberate act puts into joint control. Their earnings are their own. These differences in law sound significant and may affect many married persons' perception of the nature of their relationship, but it is probable that social conventions linked to gender have greater impact than formal legal rules on the way that assets are controlled by married persons who live together.

The rules of property do, however, become crucial at the point of divorce, for all states impose rules of distribution that have significant impact on the separate spouses' financial well-being. State divorce laws differ widely in their structures and in their details, but commonly produce similar outcomes.

In community property states, each divorcing spouse is entitled to one-half of the property acquired during the marriage. In some states judges may deviate from this division in extraordinary circumstances. The remaining states have adopted more flexible schemes of property division generally called "equitable distribution." In these states, courts are permitted to ignore the rules of separate ownership and divide all property acquired during the marriage in an equitable manner. In practice in many equitable distribution states, lawyers for divorcing persons begin negotiations with an assumption of a division closely similar to the division imposed in community property states: in the absence of special circumstances, the couple will divide equally all assets acquired by either during the marriage. And in practice in many community property and equitable distribution states, the actual division of property negotiated by parties often deviates from a fifty-fifty distribution in ways that have little to do with formal legal rules.

What is critical for our purposes is that at the point of divorce, under either regime, married persons encounter formal systems of forced allocation of assets that treat married persons as economic partners while they were together. Thus, as a single important

example, for many long-married couples today the largest single asset owned by either is a pension account accumulated in the name of one of them. In both community property and common law states, that part of the pension assets attributable to the period of the marriage will be subject to division between the partners.

State law also responds at divorce to imbalances in earning capacity between spouses, imbalances that have often been magnified during the "partnership." It does so in common law states by allowing judges to consider the disparate financial positions of the parties in the distribution of property. Many states have also devised doctrines that permit courts to compensate a spouse in some manner for helping to increase the human capital of the other partner, most commonly by bearing the costs of putting the partner through professional school. In addition, both community property states and common law states permit courts to award periodic payments, called alimony or maintenance, for the support of a spouse unable adequately to provide for herself or himself after separation. Today alimony is awarded less frequently and for shorter durations than in the past.

Death is another occasion when the law imposes financial obligations because of marriage. Under the laws of nearly all states, a married person cannot unilaterally prevent his spouse from inheriting part of his assets. Thus, when a married person dies with a will and the will fails to provide for the surviving spouse, the laws of nearly all common law states permit the surviving spouse to claim a "forced" or "elective" share of the estate, commonly one-third or one-half. Much the same result is reached in long-term marriages in community property states because, no matter what one spouse considers to be her separate property and attempts to bequeath by will to others, one-half of the assets acquired by the couple during the marriage will be considered the property of the other spouse at death.

Thus at both divorce and death, states impose on married couples a prescriptive view of the appropriate financial relationship between them. Most states now permit couples, at the point of marriage or during the marriage, to contract for a different arrangement on death or divorce than the law would otherwise impose, though also placing some limits to ensure that the decision to contract was "voluntary" and "informed."

How, by comparison, does the law treat the income and assets of single persons with a long-term partner? Very differently indeed. In both community property and common law states, the earnings of an unmarried



person and the resources bought with those earnings are entirely the property of the earner. Moreover, in no state today does the state impose on the estate of an unmarried person a forced share for a surviving partner. An unmarried person can leave her money to whomever she pleases, no matter how long a relationship she may have had with a partner.

The rules relating to the breakup of unmarried couples vary widely among the states. Until the last thirty years or so, courts in nearly all states refused to intervene at all, even when the parties had agreed to share assets, on the ground that the cohabiting relationship itself was immoral. A few states still retain this approach. In most states, however, the law has changed, responding to the huge growth in the numbers of unmarried opposite-sex couples living together and to the changed social perception of the acceptability of such cohabitation. Courts will enforce express agreements between unmarried persons to support each other or to divide property titled in the other's name. Some of the cases have involved same-sex couples.

A few states have gone further than the enforcement of agreements, coming closer to imposing a marital regime. Some will enforce "implied contracts," the contents of which courts infer not from words of agreement between the partners but from the partners' conduct — and which may in fact not reflect any actual agreement between the parties. In a few more states, judges will, at the request of a separating long-term unmarried partner, simply impose a property division that seems "just," even in the absence of any express or implied agreement between the parties. In most states, however, unmarried partners still have no state-prescribed obligations to each other that apply in the absence of agreement. Each can walk away taking whatever is titled in his or her name.

At first blush, the rules currently applied in most states to the unmarried may seem to most gay men and lesbians preferable to the rules of forced sharing imposed on married people. Most states, as just described, impose on unmarried couples only what the couple itself has agreed to. Such a regime may well appeal to couples who are suspicious of the state and couples in which neither partner is economically dependent on the other. And, even if they saw themselves as having some continuing responsibilities, many would reject the notion of the state, through its judges, having the power to apportion fault or responsibility between them under the discretionary guidelines found in the "equitable distribution" states.

Yet I think that the rules regarding the financial aspects of divorce now in place for married couples would serve lesbian and gay male couples reasonably well. In the first place, the property rules of divorce are given life as part of a larger set of procedures governing divorce proceedings, procedures that encourage, or force, couples to wind up their financial relationship prior to moving on to another relationship. In the second place, the rules regarding the division of property for married people are, to an increasing extent, subject to alteration by the agreement of the parties. Before or during marriage, the parties may contract for different outcomes between them that will be honored by courts if voluntarily entered. So seen, the rules of marriage operate as a default regime for couples who marry and do not choose a different scheme for themselves.

Of course, just as only a small proportion of opposite-sex married couples enter agreements today to vary from the rules otherwise imposed at divorce, so it is probable that few gay male and lesbian couples would do so in the future. My own belief, however, is that a default rule of imposed sharing is preferable for gay male and lesbian couples to the default rule of separate property and no continuing obligations that now exists for unmarried couples. The moral claims for independence and separate ownership have their own weaknesses. Some may look at the world of forced sharing and alimony, remember a time when married women could own nothing in their own name, and wish to reject any reminders of the dependence of women on their husbands. But the world of independence has its own poisoned roots. Independence in law means that the person with legal title wins, and title, standing alone, bears little necessary relation to the efforts that lie behind the generation of the asset or to the moral implications of a long-shared life.

Taken together, these considerations even support the claim that the default property rules for marriage will not merely serve most gay and lesbian couples reasonably well but will, in general, serve gay and lesbian couples who choose to marry better than they serve opposite-sex married couples today. Gay men and lesbians compelled on separation to share assets will be hurt less frequently when the law's promise of sharing fails to produce economic parity between the partners. Because the members of such couples are always of the same sex they more often earn similar incomes and are less likely to have gender-assigned expectations of divided responsibilities for income production during the relationship.

### III. Observations

American states and the federal government, as we have seen, treat married individuals differently than single individuals in three broad respects — privileging their relationship to their spouse in certain contexts because of their affective ties, providing them and their partners opportunities for legally recognized parenting that are not provided to others, and extending benefits and imposing obligations based on a view of the partners as economically intertwined.

Taken together, the rules bearing on marriage offer significant advantages to those to whom they apply. The case I have tried to make for gay and lesbian couples is that they need these opportunities and choices to much the same degree that heterosexual couples do.

Heterosexual conservatives object to same-sex marriage either on the ground that sex between persons of the same sex is immoral or pathological or on the ground that permitting same-sex couples to marry will somehow contribute to the crumbling of the "traditional" family. Feminists among gay and lesbian scholars are also often critical of marriage for same-sex couples, fearing different undesirable consequences for lesbian and queer communities. Neither objecting group focuses on the fit of specific legal rules with the lives of same-sex couples and, for this reason, this article has not addressed their claims. Three other sorts of doubts that do address the legal consequences of marriage might nonetheless be raised about legal same-sex marriage, even by some gay men and lesbians who might be expected to be sympathetic.

A first objection is that there is a better vehicle than something called "marriage" for extending the appropriate protections and opportunities to same-sex couples. Especially for those for whom marriage is indelibly associated with male-female relationships, the alternative of permitting same-sex (and opposite-sex couples who want it) to register with the state as "domestic partners" and extending to such partners some or all of the consequences attached to marriage may seem attractive.

No American state has yet adopted domestic partner registration, but, as we have seen, some states, through imaginative court decisions and occasional statutes, are beginning to recognize unmarried couples for particular purposes. Formal registration has been instituted in Denmark and Norway, where registered same-sex partners are treated precisely like married couples with



regard to all financial and economic regulations, but are not labelled as "married." Unless a regime of domestic partnership were developed under which same-sex couples were treated just as opposite-sex married couples are, same-sex couples would probably find that domestic partnership legislation excluded benefits that they would much like to have. Thus, in Denmark, for example, registered same-sex couples are treated like opposite-sex married couples for purposes of economic benefits, but not for purposes of the adoption laws or any other laws that apply to parenting.

I do not, however, wish to seem critical of the movement for domestic partnership registration. I believe that, though the rose by another name will not smell as sweet to some of us, states are far more likely to accept domestic partnership than same-sex marriage. Denmark — and the fifty American states — may eventually accept for gay couples united under a name other than "marriage" all the special rules for married persons, including those that apply to parenting. And those of us who favor legal same-sex marriage must acknowledge that just as "domestic partnership" legislation might provide only parts of the package of legal consequences that now attaches to marriage, so also legal "marriage" itself might be granted piecemeal as well: a state might open legal marriage to same-sex couples but withhold parenting or other benefits from them, or, more fundamentally, some states might extend all state laws bearing on marriage to same-sex couples while the federal government withheld the incidents of federal law.

A second doubt about pursuing changes in the laws of who may marry is that the benefits of marriage are likely to be unevenly distributed among same-sex couples. Nitya Duclos, a Canadian scholar, has argued, for example, that the rules of marriage would primarily benefit lesbians and gay men who are members of the idle class — "those who are already fairly high up in the hierarchy of privilege." She does not argue that this lopsided allocation of benefits is a reason not to permit same-sex marriage, for surely it is not, but rather is a reason to be less exultant about what will be achieved by it.

Duclos may be right. Those high in the hierarchy of privilege usually come out ahead. Still, at least in this country, many lower-income same-sex couples will find great benefits in marriage. Duclos claims that "[t]hose who rely for most of their income on state benefits are more likely [than middle class persons] to be economically penalized for marrying," and it is true that a

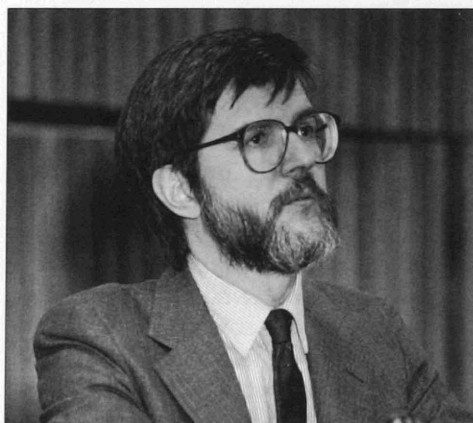
significant cost of marriage for some lower-income persons who marry a working person is the loss of government benefits, such as Medicaid or Supplemental Security Income. It is also true that some other rules, such as those exempting bequests to a spouse from the estate and gift taxes, are of value only to those who have large sums to give away. Still, there may be compensating gains for low income persons. Social Security retirement benefits for a nonworking spouse and Social Security survivor benefits are of most importance to those without long ties to the formal economy. Medical benefits tied to employment — including employment of some low-earning government employees — are of immense significance to spouses with jobs that carry no health coverage at all. And other benefits, such as the immigration rules or rules that relate to intestate succession, are likely to be at least as frequently invoked by the people of modest incomes as they are by the well-heeled. It is impossible for all sorts of reasons to make a confident prediction of what class-groups among gay men and lesbians would benefit most from being permitted to marry, but there is ample reason to believe that the rules relating to marriage will be appealing to many people of all classes.

A final criticism of the laws bearing on married persons is more fundamental: even if legal marriage would offer benefits to a broad range of same-sex couples, some might claim that all these advantages are illegitimate — illegitimate for both same-sex and opposite-sex couples — because they favor persons in two-person units over single persons and over persons living in groups of three or more, and because they favor persons linked to one other person in a

sexual-romantic relationship over persons linked to another by friendship or other allegiances. Those of us who are gay or lesbian must be especially sensitive to these claims. If the deeply entrenched paradigm we are challenging is the romantically linked man-woman couple, we should respect the similar claims made against the hegemony of the two-person unit and against the romantic foundations of marriage.

Still, nearly all reform to correct disparate treatment in our society is incremental. It comes at points at which the state finally recognizes the legitimacy of the claims of some long disfavored group. Thus, within this century, governments have gradually changed their posture toward the legal position of the child born outside of marriage and toward unmarried opposite-sex couples in their relationships with one another.

A next appropriate step is the step discussed in this article — the recognition of same-sex couples who wish to marry. And although it is conceivable, as some have feared, that permitting gay people to marry will simply reinforce the enshrined position of married two-person units in general in our society, it seems at least as likely that the effect of permitting same-sex marriage will be to make society more receptive to the further evolution of the law. By ceasing to conceive of marriage as a partnership composed of one person of each sex, the state may become more receptive to units of three or more (all of which, of course, include at least two persons of the same sex) and to units composed of two people of the same sex but who are bound by friendship alone. All desirable changes in family law need not be made at once.



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